SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. and NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

EMERY AIR FREIGHT CORPORATION, *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRYCE REA, JR.
THOMAS M. KNEBEL
917 Munsey Building
1329 E Street, N.W.
Washington, D. C. 20004
Counsel for Petitioners

January 20, 1967

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Law Motor Freight, Inc. and National Motor Freight Traffic Association pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the First Circuit entered in this cause on July 20, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 364 F. 2d 139 and appears in Appendix hereto, p. 13a *et seq.* The opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals appear in Appendix hereto, p. 26a *et seq.*

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The decree of the Court of Appeals was entered on July 20, 1966. Petitioners' petition for rehearing was denied on August 23, 1966 (Appendix, p. 25a). By order of the Honorable Abe Fortas entered on November 23, 1966 the time within which Petitioners might file a petition for a writ of certiorari was unconditionally extended to January 20, 1967.

QUESTIONS PRESENTED

1. Are the criteria employed by the Civil Aeronautics Board to determine whether or not motor common carriage of property can be authorized and regulated by it as pickup and delivery service in connection with air transportation within the meaning of Section 403(a) of the Federal Aviation Act and Part 222 of its Economic Regulations lawful?

2. May the Civil Aeronautics Board grant an application by an air carrier for authority to perform the motor common carriage of property upon a finding that such transportation is truly pickup and delivery service in connection with air transportation when the finding is based solely on allegations of fact in the application and is made in the face of objections and

a request for hearing by competing common carriers, which objections and request join issues of fact?

3. Are the findings of the Civil Aeronautics Board that the motor common carriage it authorized is truly pickup and delivery service in connection with air transportation supported by substantial evidence?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act, the Interstate Commerce Act, the Administrative Procedure Act and the regulations of the Civil Aeronautics Board and the Interstate Commerce Commission appear in Appendix hereto, p. 1a *et seq.*

STATEMENT OF THE CASE

Petitioner Law Motor Freight, Inc. is a motor common carrier of property certificated to operate in interstate and foreign commerce by the Interstate Commerce Commission. Insofar as pertinent here, Law's certificate authorizes it to perform transportation between Logan International Airport at Boston, Massachusetts and Nashua, New Hampshire. National Motor Freight Traffic Association (NMFTA) is a membership corporation with some 4,000 members, all of whom are motor carriers of property operating in interstate and foreign commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission.

Emery Air Freight Corporation is an indirect air carrier of property, i.e. and air freight forwarder, whose operations in interstate and foreign commerce are conducted under regulation by the Civil Aeronautics Board. On June 16, 1964 Emery, pursuant to

Section 222.3(a) of the Board's Economic Regulations, 14 C.F.R. 222.3(a), Appendix, p. 11a, filed an application for authority to file a tariff providing for the performance by it of the motor common carriage of property between Logan International Airport and Nashua (Record, p. 1). On July 6, 1964 NMFTA filed with the Board a motion to dismiss the application on the ground, *inter alia*, that it did not comply with the Board's Economic Regulations.

On February 1, 1965, the Board issued an order granting Emery's application. In so doing, it stated: "Although we agree [with NMFTA] that Emery's original application may have been wanting in details, the information contained in its amendment clearly brought the application into compliance with Section 222.3(a)." Since Emery had not served NMFTA with its amendment and the Board had not published notice thereof in the Federal Register, Petitioners were unaware of its filing until the Board's order was issued.[1] On March 10, 1965, after NMFTA had filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, the Board vacated its order granting Emery's application and moved the Court of Appeals to dismiss or remand the petition for review. On April 14, 1965 the Court remanded the case to the Board. On April 29, 1965 NMFTA filed with the Board its "Renewal of Motion To Dismiss or Alternatively for Oral Hearing." (Record, p. 5).

NMFTA's renewed motion was supported by an affidavit from Law's Vice President of Traffic reciting

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[1] Section 222.3(b) of the Board's Economic Regulations provides that notice of applications under Section 222.3(a) shall be published in the Federal Register.

that since 1954 Law had been moving air freight between Boston and Nashua as a specialized phase of its operations under its certificate of public convenience and necessity issued by the Interstate Commerce Commission; that its pattern of operations was established through consultation and agreement with Emery and that Emery accounted for about 75 per cent of the air freight it handled; that Law provided expedited single-day service to Logan International Airport from Nashua and points within radii of about 50 miles from its terminals at Nashua and Keene, New Hampshire, and provided for the pickup of air freight at Logan International Airport destined to those areas three times a day; and that in addition Law provided "on call-on demand" service at any time including Saturdays, Sundays and holidays (Record, pp. 17-22).

On March 22, 1966 the Board issued an order granting Emery's amended application on the basis of the following findings (Appendix, p. 29a):

(1) Nashua is only 34 miles from Boston on the outskirts of the Greater Boston Metropolitan Area, and has a strong community of interest with Boston.

(2) Boston is the nearest certificated point to Nashua offering multiple frequencies for the transportation of air cargo in all directions.

(3) The ground transportation proposed is from a relatively small city without an airport to a nearby metropolitan airport.

(4) The distance between Nashua and Boston is not so great as to preclude Emery's services being offered as part of the basic air transportation service at Boston because the service is no more extensive than services

that have been authorized at New York, Chicago and Los Angeles.

(5) Emery proposes (a) to coordinate pickup and delivery services with the schedules of the direct air carriers, (b) to utilize equipment of the type traditionally used for pickup and delivery operations, (c) to charge rates closely related to charges for pickup and delivery "within the recognized terminal area zone" of Boston.

Based upon these considerations, the Board concluded that Emery's service "constitutes pick-up and delivery service and is 'in connection with air transportation' within the meaning of Section 403(a) of the Federal Aviation Act of 1958, as amended."

On April 29, 1966, Law and NMFTA, pursuant to Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486, filed a petition for review of the Board's order in the United States Court of Appeals for the First Circuit. On July 20, 1966, that Court rendered its opinion and entered its decree affirming the order. The Court held that no evidentiary hearing on Emery's application was required, that the Board's criteria for determining whether particular motor transportation of property is truly pickup and delivery service in connection with air transportation were proper, and that the Board's findings were supported by substantial evidence.

On August 3, 1966 Law and NMFTA filed a petition for rehearing of the Court's opinion and decree limited to the question whether the Board's findings were supported by substantial evidence (Record, p. 77). On August 23, 1966, the Court denied rehearing on the

ground that "this is not a case where the sufficiency of the Board's evidence was required to be tested on a record which, when viewed as a whole, contained substantial conflicting testimony." (Appendix, p. 25a.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case and *National Motor Freight Traffic Association and United Motor Freight, Inc.* v. *Civil Aeronautics Board,* No. 19,953 in the United States Court of Appeals for the District of Columbia Circuit, decided December 6, 1966, are cases of first impression in this Court and in the courts below, as well as the first two cases in which the Civil Aeronautics Board implemented Part 222 of its Economic Regulations, which prescribe the procedure for the filing of applications by air carriers for authority to perform motor common carriage and the substantive standards governing action on them. The issues in both are so substantially identical that, had both been decided by the same court, a single petition for a writ of certiorari covering both would have been filed under Paragraph 5 of Rule 23 of this Court. Hence, if a writ be granted in one it should certainly be granted in the other.

In light of the foregoing Petitioners see no reason to burden the Court with two statements of reasons why writs should be granted. However, in the *United Motor* case the issues are more sharply drawn, the problem the cases present in the effectuation of the Congressional scheme for the regulation of motor common carriage is in better focus, and the consequences of the Board's action on motor common carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission is more evident. Therefore, Petitioners ask the Court

to treat the statement of reasons why a writ should be granted in the petition being filed in that case as the reasons why a writ should be granted in this case.

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari being filed in *National Motor Freight Traffic Association and United Motor Freight Inc.* v. *Civil Aeronautics Board* Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review its decree in this cause.

Respectfully submitted,

BRYCE REA, JR.
THOMAS M. KNEBEL
1329 E Street, N. W.
Washington, D. C. 20004
Counsel for Petitioners

Dated: January 20, 1967

APPENDIX

Relevant Statutes

Interstate Commerce Act, Section 203(b)(7a), 49 U.S.C. § 303(b)(7a):

> Section 203(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; . . .

Federal Aviation Act of 1958, Section 403(a), 49 U.S.C. § 1373(a):

> Section 403(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of

currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Administrative Procedure Act

5 U.S.C. § 551(8), (9):

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 U.S.C. § 556(d):

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

Relevant Regulations

Interstate Commerce Commission:

49 C.F.R. § 210.40 Motor transportation of property incidental to transportation by aircraft.

(a) *Property moving in collection, delivery, or transfer service.* Transportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or

air freight forwarder (indirect air carrier) providing the line-haul transportation, which terminal area, if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier.

* * * *

(c) *Individual determination of exempt zones.* Upon its own motion or upon petition filed by any interested person, the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provisions of paragraph (a) of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or airfreight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

* * * *

49 C.F.R. § 404.1 Use by air freight forwarders of regulated motor common carrier service.

An air freight forwarder (indirect air carrier) subject to economic regulation under the Federal Aviation Act may receive from or turn over to motor common carriers subject to economic regulation under part II of the Interstate Commerce Act shipments the transportation of which is not within the scope of the incidental-to-aircraft exemption of section 203(b)(7a) of the Interstate Commerce Act without being considered as conducting operations as a freight forwarder subject to part IV of the Interstate Commerce Act provided:

(a) That the air freight forwarder shall not hold out to assume responsibility for, nor make any claim in its advertising, solicitation of freight, or tariff publications that it will assume responsiblity for, any shipment prior to its receipt from or after it is turned over to an authorized motor common carrier for movement beyond the air freight forwarder's terminal area as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

(b) That all shipping documents issued by the air freight forwarder shall state clearly that its responsibility for the shipment does not extend beyond its actual air movement and the territorial extent of its terminal area as provided for in tariffs published with the Civil Aeronautics Board.

(c) That the air freight forwarder shall receive no compensation from any shipper or motor carrier for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier for movement beyond the air freight forwarder's terminal area.

Civil Aeronautics Board

14 C.F.R. § 222

Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File

By Notice of Proposed Rule Making, 26 F.R. 8037, and Economic Draft Release No. 33, Docket 12951, the Board announced it had under consideration a new Part 222 of the Economic Regulations relating to the determination of zones for air cargo pickup and delivery services which may be provided pursuant to appropriate tariff filings. Therein the Board described the current practice under which an air carrier decides at which locations it wishes to provide pickup and delivery service (if at all) in and around a particular point certificated to receive air service, and files a pickup and delivery tariff with the Board setting them out. In deciding whether to accept or reject the tariff, the Board has used distance criteria. Generally speaking, tariff proposals for pickup and delivery service at distances extending beyond 25 miles either from the airport through which the carrier serves the particular point, or from the corporate limits of the city, have not been regarded as acceptable. In a number of instances, tariffs providing for services substantially beyond a 25-mile limit have been permitted to become effective, particularly at the more important certificated points.

The notice stated that the procedure of regulating terminal area services through tariff rejections under the 25-mile rule of thumb has been challenged both on a procedural basis as well as with respect to substantive validity. In that connection, the Board noted the differing views of the various classes of air carriers which had been previously solicited as to the need for changes in the Board's air cargo pickup and delivery tariff procedures and policy.

The Board sought comments on a proposed rule which contemplated the acceptance of pickup and delivery tariffs for services (a) within an area of 50 miles of the municipal center of any point receiving air service, and (b) within any "authorized pickup and delivery zone" as might be

specifically established by the Board for the major air cargo generating points. It also contemplated an application procedure under which pickup and delivery service could be considered to locations which had not been previously authorized pursuant to (a) and (b) above.

The Board's notice adverted to the jurisdictions of the Civil Aeronautics Board and the Interstate Commerce Commission in relation to air cargo pickup and delivery services. The Board's jurisdiction is confined to the acceptance or rejection of pickup and delivery tariffs filed under section 403(a) of the Federal Aviation Act as service "in connection with . . . air transportation" while the Interstate Commerce Commission must decide whether such surface transportation is a service which is "incidental to transportation by aircraft" under the Interstate Commerce Act and thus exempted pursuant to section 203(b)(7a) of Part II of that statute, or alternatively, whether a certificate of public convenience and necessity must be issued by that Commission authorizing such service. The notice stated that obviously the Board and the Commission should strive to administer the respective Acts so that there is no undue conflict between what the Board considers "service in connection with . . . air transportation" and what the Commission considers service "incidental to transportation by aircraft." In this connection, the Interstate Commerce Commission instituted a rulemaking proceeding in October 1961[1] to determine and prescribe by regulation the circumstances under which, and the areas or distances within which, the motor carriage of property in interstate or foreign commerce is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act.

In his Transportation Message to Congress of April 5, 1962, the President stated that he was "requesting the

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[1] Motor Transportation of Property Incidental to Transportation by Aircraft (No. MC-C-3437).

Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Maritime Commission, to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislative or administrative action that will improve the regulatory process." Pursuant to the request, inter-agency committees have been established on Terminal Area matters and Freight Forwarder matters, and meetings for the consideration of their problems have been held on the Commission and staff levels.

In the Board's rulemaking proceeding, extensive comments were received as a result of the original notice and a supplemental notice, dated February 5, 1963, which sought specific information as to the adequacy of ICC licensed trucker services for air cargo pickup and delivery beyond the 25-mile zone.

On the basis of the extensive information which has been made available to the Board, we have reached these conclusions: full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation.

There are numerous certificated points which have only limited pickup and delivery services or where such service extends to the corporate limits of the community or only slightly beyond. This situation apparently reflects the current limited use of air cargo at these points. For these

communities, it is clear that the Board's present procedure of accepting tariffs under the 25-mile rule of thumb is adequate and raises no significant regulatory question for either the CAB or the ICC.

We therefore need be concerned with only the relatively few major air cargo generating points—where today effective tariffs on file with the Board provide for extensive pickup and delivery services which, in several cases, go well beyond the 25-mile rule-of-thumb area. In those instances where true pickup and delivery services are provided in relatively small vans or straight trucks and geared to air carrier schedules, such services appear to constitute "service in connection with air transportation," and we have no reason to believe that such tariffs are not properly filed. Furthermore, to the extent that additional direct air carriers or air freight forwarders desire to file pickup and delivery tariffs of their own proposing similar service in these areas, they will also be accepted.

There remains the question of considering any requests by direct air carriers or air freight forwarders for extension of pickup and delivery services beyond the areas covered by existing tariffs or the established 25-mile rule-of-thumb area. The Board believes that this should be considered only on the basis of an application procedure (similar to that set forth in our notice of proposed rulemaking) which would provide for notice to and comments by interested persons. The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul.

Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

In consideration of the foregoing, the Civil Aeronautics Board hereby adopts, effective June 12, 1964, new Part 222 of its regulations (14 CFR Part 222), to read as follows:

Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File

Sec.

222.1 Applicability.

222.2 Filing of tariffs.

222.3 Service to locations not previously authorized.

§ 222.1 *Applicability.* This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of tariffs.* In accordance with the provisions of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point, or (b) provide for service to places or areas included in

other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3 hereof. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to locations not previously authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery service to any location(s) not authorized by section 222.2 of this part, such carrier shall file with the Board a written application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all cases shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission,

Washington, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b), answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon. It shall also be served upon the applicant and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of authority.* Authority to include any location(s) in a pick-up and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6731.

LAW MOTOR FREIGHT, INC., ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

On Petition for Review of an Order of
the Civil Aeronautics Board

Bryce Rea, Jr., with whom *Kenneth B. Williams, F. G. Freund, Thomas M. Knebel, Williams, Kelly, Shrigley & Ryan* and *Rea, Cross, Knebel & Kinnaird* were on brief, for petitioners.

Warren L. Sharfman, Associate General Counsel, with whom *Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, *Donald F. Turner*, Assistant Attorney General, and *Howard E. Shapiro*, Attorney, Department of Justice, were on brief, for Civil Aeronautics Board, respondent.

George C. Neal, with whom *Pogue & Neal* was on brief, for Emery Air Freight Corporation, intervening respondent.

Before ALDRICH, *Chief Judge*.
McENTEE and COFFIN, *Circuit Judges*.

Opinion of the Court

July 20, 1966

COFFIN, *Circuit Judge*. This case comes to us on petition to review an order of the Civil Aeronautics Board

(the Board) granting Emery Air Freight Corporation (Emery) authority to file tariffs and, pursuant thereto, perform pickup and delivery services for air freight traffic between Boston, Massachusetts and Nashua, New Hampshire. The petitioner, Law Motor Freight, Inc. (Law), is an Interstate Commerce Commission certificated motor carrier which has hitherto carried air freight for Emery between Boston and Nashua, and, accordingly, foresees loss of this business.[1]

Jurisdiction and venue rest on 49 U.S.C. §§ 1486(a) and 1486(b). The Board's order is challenged for lack of a prior hearing, and absence of sufficient subsidiary facts to justify its ultimate finding that Emery's proffered service was truly pickup and delivery and thus "in connection with" air transportation.

Emery is an air freight forwarder. Its business is to assemble goods which are to be shipped by air, organize them into cargoes for carriage by an air carrier, and receive, divide, and distribute them to consignees on arrival. It serves Boston, among other cities, and presently provides pickup and delivery service between Boston and Lowell, Massachusetts, 14 miles distant from Nashua. Such service, though performed over the roads from an airport to a municipality by motor vehicles, can be performed by air carriers or air forwarders, if authorized by the Board as "services in connection with . . . air transportation". Section 403(a), Federal Aviation Act, 49 U.S.C. § 1373(a), and Section 222, Civil Aeronautics Board Economic Regulations, 14 C.F.R. 222.[2]

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[1] A co-petitioner, the National Motor Freight Traffic Association, is a trade association of motor carriers, of which Law is a member. We shall, for convenience, refer only to Law as the petitioner.

[2] A power, substantially if not precisely complementary, is that of the Interstate Commerce Commission to exempt motor carriers from the requirement of a certificate of public convenience and necessity when they render services "incidental to transportation

These regulations are in themselves important facts in this case, fixing the framework for assessing the action of the Board and the rights of the parties. The background and concept of the Board's present policies are set forth in a narrative preamble; specific procedures, in numbered sections. The preamble recites that in the past a 25 mile radius from an airport was followed as a rule of thumb governing authorization of pickup and delivery tariff proposals. This radius, however, had been substantially exceeded in a number of cases. After criticism of the rule of thumb approach, the Board solicited comments from carriers and participated in interagency committee study with the Interstate Commerce Commission. The Board's conclusions were that:

> "full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation."

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by aircraft". Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(7a).

. Interagency collaboration between I.C.C. and the Board has sought to minimize the potential conflict arising out of the Board's interpretation of "services in connection with . . . air transportation" and I.C.C.'s interpretation of services "incidental to transportation by aircraft". I.C.C.'s regulation, 49 C.F.R. 210.40, in effect accepts the pickup and delivery areas designated in Board authorized air carrier tariffs, reserving the right, however, to make its own determination if circumstances warrant. The Board, for its part, states in its regulation that its prior determination of a tariff would not interfere with I.C.C.'s freedom to grant or withhold an exemption, although it anticipates that I.C.C. will give appropriate weight to its findings.

The preamble in essence ratified the use of the 25 mile rule of thumb approach for numerous certificated points, which have presented no difficulty for either the Board or I.C.C., as well as the existing tariffs which had authorized pickup and delivery services beyond the 25 mile radius. In indicating the Board's approach to future requests for extention beyond a 25 mile radius, the preamble stated:

> "The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul."

The regulations themselves (§§ 222.1, 222.2, 222.3) provided for the filing of written applications for tariffs, in which would be set forth the desired locations, reasons why the contemplated service is deemed appropriate, and economic data and other facts relied on. Instructions for service of copies on interested parties were followed by the requirement that answers of opponents or supporters of an application "shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon."

Passing from the regulations to the events in this case, the relevant facts are set forth in Emery's application, as amended, for authority to provide pickup and delivery service between Boston and Nashua; petitioner's motion to dismiss with accompanying affidavit and exhibits of its Vice President of Traffic; and the Board's order granting Emery's application.

Emery's application, as amended, addressed itself both to the rationale for bringing Nashua within the Boston

air freight pickup and delivery zone and to the service it would provide. As to the first issue, Emery set forth the distance between Boston and Nashua (34 miles), Nashua's "strong cultural, commercial and industrial affinity" to Boston, and the allegation that most of Nashua's commerce moves through "the Boston gateway". As to Emery's proposed service, "same day" delivery from Boston and "same night" shipment from Nashua would be offered through coordination with airlines schedules, straight vans of not over 5,000 pound capacity would be utilized, and charges would be $2.00 per hundred pounds, compared with its $1.55 cwt charge already provided in its service to Lowell.

The motion to dismiss made the following points: (1) that I.C.C. criteria should govern; (2) that therefore the question was whether Nashua lay within the "terminal area" of Boston; and (3) that coordination with airline schedules, utilization of straight vans as opposed to tractor-trailers, and the proposed charges had nothing to do with the inclusion of Nashua within Boston's terminal area. The motion prayed that Emery's application be dismissed or, alternatively, that a hearing be had. The affidavit of Law's Vice President set forth its I.C.C. authority as a common carrier, giving line-haul service between Boston and various points in New Hampshire, the pickup service provided from its Keene and Nashua terminals, and its equipment and efforts to accommodate air freight shippers and receivers. The affidavits alleged that Emery accounts for 75 per cent of the air freight Law handles and that granting Emery's application would seriously jeopardize Law's "same night" service to all areas of New Hampshire and northern Massachusetts.[3]

The Board's order, after reciting the averments of the petition and the motion to dismiss, noted that the proposed

[3] Law's air freight business in 1964 was 2½% of its total gross income of $1,500,000, or $31,500.

service was no more extensive than that which had been authorized in other metropolitan areas, and that the proposed service would be coordinated with airline schedules, that the equipment to be used was that traditionally used for pickup and delivery operations, and that rates would be charged which would be closely related to those for similar services within the presently recognized terminal zone. The Board concluded that the service was truly pickup and delivery and was "in connection with air transportation". Meeting petitioner's various objections, it held that Emery had filed sufficient data, that it was not limited by any view the I.C.C. might have taken in administering its own regulations, and that neither legislation nor the exercise of its discretion indicated the need for an evidentiary hearing.

The first issue to consider is whether or not a hearing was required. Petitioner bases its claimed right to a hearing on the theory that the Board's action was that of licensing Emery to engage in motor transportation in competition with Law. Licensing being an act of adjudication, argues petitioner, a hearing is required, even if the proceeding is labelled rule-making, and even though the governing statute does not require a hearing. This conclusion is further indicated, claims petitioner, by the application of principles of due process since Law's property, its I.C.C. license, would be impaired by the Board's action in granting Emery's application.

We do not accept this line of argument. Analysis, recognized administrative practice, specific statutory guidance, accepted principles of statutory construction, and constitutional interpretation all militate against petitioner's point.

The result of the Board order in this case is to declare Nashua within the Boston pickup and delivery area so that all air carriers and air freight forwarders may henceforth, on approval of tariffs filed, operate surface transportation service to Nashua which will be considered to be "in con-

nection with . . . air transportation". The Board, in effect, has declared new ground rules available to the air carrying industry applicable to an additional nine miles of terrain.

In our view, this falls within the ambit of rule-making, even though the occasion was the application of one company for pickup and delivery tariffs, and the Board's order was accordingly addressed to the applicant. The Board's action falls within the express definition of "rule" in 5 U.S.C. § 1001(c): ". . . any agency statement of general or particular applicability and future effect designed to . . . prescribe . . . policy . . . and includes the approval or prescription for the future of rates, . . . services or allowance therefor . . . ." The order is of "future effect". It is an agency statement of both general and particular applicability. While addressed to a named applicant, it authorizes pickup and delivery services in a particular area which determination is available to all other air carriers and air freight forwarders.[4] After an abortive start, the full requirements of 5 U.S.C. § 1003 respecting notice and the opportunity to submit written data and argument were complied with.

We recognize that the Board's order also, arguably, meets the definition of "license" in 5 U.S.C. § 1001(e): ". . . any agency permit, . . . approval, . . . or other form of permission." That the same act may have characteristics of both rule making and licensing is not unusual. See Davis, 1 Administrative Law Treatise § 5.02 at 297-298 (1958).

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[4] This case would seem to be of the kind which led Congress, late in the legislative consideration, to add the words "or particular". As Professor Davis describes the "clear' 'purpose, "the words 'or particular' were not intended to change into rule making what before the [Administrative Procedure] Act was regarded as adjudication. Those words mean no more than that what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation." Davis, 1 Administrative Law, Treatise, § 5.02, at 296 (1958).

But, for the purpose of determining the applicable procedural requirements consistent with sensible administrative practice, we affix the "rule-making" label to the Board's order in this case.[5]

This is consistent with the practice of the Interstate Commerce Commission in determining the limits of a commercial zone as a basis of granting exemptions for surface carrier terminal areas under section 203(b)(8) of the Interstate Commerce Act. Such an act was held to be rule-making and exempt from the requirement of a formal hearing by reason of being an "agency statement of general . . . applicability and future effect designed to implement [and] interpret . . . law" under section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(c). *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone,* 1953, 61 M.C.C. 489.[6]

As for specific statutory guidance, even if the Board's act were "adjudication", section 5 of the Administrative Procedure Act makes it clear that the requirement of a hearing depends on whether it is a "case of adjudication

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[5] The order in this case may be compared to the more momentous action of the Board in *American Airlines, Inc.* v. *Civil Aeronautics Board,* D.C. Cir., March 2, 1966, Nos. 18833, 18834, 18840, 359 F. 2d 624, where the court *en banc* upheld a regulation restricting "blocked space service" to all-cargo carriers and thereby prohibiting the provision of such service by combination carriers. Despite the fact that only two domestic all-cargo carriers are presently certified and that the existing licenses of the combination carriers would be adversely affected, the rule-making process was held appropriate, and a full adjudicatory hearing not required.

[6] Petitioner's only comment on this observation was that the I.C.C. practice is to develop a record through either an oral hearing or verified written statements "which all parties have the right to cross examine and rebut". Leaving aside the question of the susceptibility of a written statement to cross-examination, the equivalent of verified written statements was precisely the method followed here by the Board pursuant to Part 222 of its regulations.

required by statute". 5 U.S.C. § 1004. Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373(a), does not require a hearing, although other sections do. With such a statutory configuration, the clear indication is that the legislative omission was significant. *American Trucking Association, Inc., et al.* v. *United States, et al.*, 1953, 344 U.S. 298, 319, 320; *LaRue* v. *Udall*, D.C. Cir., 1963, 324 F.2d 428, 432, *cert. denied*, 1964, 376 U.S. 907; *Nebraska Department of Aeronautics, et al.* v. *Civil Aeronautics Board*, 8 Cir., 1962, 298 F.2d 286, 292.

The remaining question on the issue of hearing is whether such vital rights to life, liberty, or property were involved as to invoke the constitutional due process mandate for a hearing. We see none. Petitioner's citations of *Riss & Co.* v. *United States, et al.*, 1951, 341 U.S. 907; *Wong Yang Sung* v. *McGrath, et al.*, 1950, 339 U.S. 33; and *Hornsby* v. *Allen, et al.*, 5 Cir., 1964, 326 F.2d 605 are not availing. These were cases where the individual or company was a party requesting a certificate of public convenience and necessity *(Riss)*, a license to operate a liquor store *(Hornsby)*, or was resisting deportation *(Wong Yang Sung)*. All, therefore, involved a specific adjudication of basic rights, wholly divorced from any purpose of setting agency policy for the future.[7]

Admittedly, petitioner will face increased competition as the result of the Board's decision. But freedom from competition is not constitutionally protected. *Tennessee Electric Power Co., et al.* v. *Tennessee Valley Authority, et al.*, 1939, 306 U.S. 118, 138-142; *Alabama Power Co.* v. *Ickes, et al.*, 1938, 302 U.S. 464; *First National Bank of*

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[7] See *American Trucking Associations, Inc.* v. *United States, supra*, 344 U.S. 298 at 322 n. 20: ". . . the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected." See also *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 1961, 367 U.S. 886, 894-895.

Smithfield, N.C. v. *Saxon,* 4 Cir., 1965, 352 F. 2d 267, 272; *Fugazy Travel Bureau, Inc.* v. *Civil Aeronautics Board,* D.C. Cir., 1965, 350 F. 2d 733, 740.[8]

The second issue in this case is whether, even though no hearing was required, the Board acted in the absence of insufficient facts relevant to the ultimate issue it had to decide.

Petitioner's argument is that the basic question was whether the proposed service between Boston and Nashua was in fact pickup and delivery service. It argued that determination of this question was governed by the I.C.C.'s definition of a "terminal area" as "a single homogeneous community, identifiable as such by factors of commercial and industrial integrity, population and business density, and the existence of some reasonable compact limit to the geographical scope of community affairs and influence . . . ." *Central Trunk Lines* v. *Pan American S. S. Corp.,* 1960, 82 M.C.C. 395, 404, aff'd. *sub nom. Sea-Land Service, Inc.* v. *United States,* D. Del., 1963, 222 F. Supp. 558. With this as the criterion, reasons petitioner, Emery failed to establish any relevant facts.

We approach this issue with a healthy respect for the findings of the administrative agency. If its decision shows a reasonable relation to statutory provisions and is based on substantial evidence, even if differing conclusions can be drawn from the evidence, we should, as we do, affirm. *Consolo* v. *Federal Maritime Commission,* 1966, 383 U.S. 607, 619-621.

We start out with an observation which has to do with making the administrative process work. Part 222 of the Board's regulations, as we have noted, specifically states that statements on opposition to an application for pickup and delivery tariffs shall set forth detailed reasons, economic facts, and data relied upon. We acknowledge that

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[8] Special circumstances not here present, may require a hearing in a competitive situation. See *L. B. Wilson, Inc.* v. *Federal Communications Commission,* D.C. Cir., 1948, 170 F. 2d 793.

the economic data supplied by Emery were scant and general. But we do not look upon a Part 222 proceeding as an exercise in Elizabethan pleading. If petitioner really had facts which bore upon the ultimate issue, it should have made them available. *Cf. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 9 Cir., 1964, 334 F. 2d 185, 194.

While the facts alleged by Emery and found by the Board can easily be criticized as being sparse, we suspect that further accumulation of data would not have greatly assisted the Board. In oral argument we asked what further facts might be adduced. Counsel referred to the census definition of the Boston metropolitan area, the precise distance between Nashua and Boston, the determination of any rural areas between the two cities, the political situation. We do not deem the lack of such information a fatal deficiency in the record, particularly where petitioner had the opportunity and the obligation to submit relevant facts.

The application alleged, and the Board found a sufficient nexus between Boston and Nashua, and the type of service offered which would cater to the regular, prompt, inexpensive, small lot service which is connoted by the term "pick-up and delivery". Although we find the record thin, we cannot quite say that the Board was clearly erroneous in finding sufficient evidence.

The only remaining question is whether the Board, in applying the criteria announced in its regulations, was acting beyond its authority in not considering itself bound by I.C.C.'s criteria of a "terminal area". We conclude that the Board acted properly.

The Board has promulgated its philosophy and its procedures in concert with the Interstate Commerce Commission. The system, devised to avoid interagency conflict while preserving agency sovereignty, is to give the Board the first judgment, which shall be given non-conclusive respect by I.C.C.

The Board's new criteria for determining pickup and delivery zones, are not necessarily identical with I.C.C.'s standard of a "homogeneous community, identifiable as such by factors of commercial and industrial integrity". The Board's new formula is a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments. This is not unreasonable for an agency mandated to develop air transportation. The 25 mile rule of thumb must already be a strain on I.C.C.'s tolerant definition of "a homogeneous community."

What is at rock bottom here is a continuing accommodation between two independent agencies whose larger task is to work toward the resolution of transportation problems in the light of technology and urbanization. Recent opinions reflect both the accommodation principle in the approach of the two agencies and the power of each to determine, for its purposes, what is "in connection with" or "incidental to" air transportation. *City of Philadelphia* v. *Civil Aeronautics Board,* D.C. Cir., 1961, 289 F.2d 770, 774-775; *Wycoff Company, Inc.* v. *United States,* D. Utah, 1965, 240 F. Supp. 304, 309-310; *Air Dispatch* v. *United States,* E.D. Pa., 1964, 237 F. Supp. 450, 452-453. In holding that the Board applied proper standards, we are not, of course, implying that I.C.C. is bound to rule that Nashua is within the Boston terminal area for the purpose of granting exemptions under its statute. See *City of Philadelphia* v. *Civil Aeronautics Board, supra,* 289 F.2d at 774-775. At the present time, I.C.C. not having been called upon for its own decision, there is not even a conflict between administrative actions.

We take minimum notice of petitioner's allegations that the application was unsworn, in the light of 18 U.S.C. § 1001. Nor are we impressed with the allegation that the Board attempted to base its order on any findings of inadequacy on the part of petitioner.

A decree will be entered affirming the order of the Board.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6731

LAW MOTOR FREIGHT, INC., ET AL.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD ET AL.,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

Bryce Rea, Jr., with whom *Kenneth B. Williams, F. G. Freund, Thomas M. Knebel, Williams, Kelly, Shrigley & Ryan* and *Rea, Cross, Knebel & Kinnaird* were on brief, for petitioners.

Warren L. Sharfman, Associate General Counsel, with whom *Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, *Donald F. Turner*, Assistant Attorney General, and *Howard E. Shapiro*, Attorney, Department of Justice, were on brief, for Civil Aeronautics Board, respondent.

George C. Neal, with whom *Pogue & Neal* was on brief, for Emery Air Freight Corporation, intervening respondent.

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Opinion of the Court on Petition for Rehearing

August 23, 1966

PER CURIAM. The petition for rehearing is denied. We think there was substantial evidence. In answer to the point made, this is not a case where the sufficiency of the Board's evidence was required to be tested on a record which, when viewed as a whole, contained substantial conflicting testimony.

Order No. E-23401

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 22nd day of March, 1966

Docket 15325

Application of
EMERY AIR FREIGHT CORPORATION
for authority to file a pick-up and delivery tariff.

Order Authorizing Filing of Pick-Up and Delivery Tariff

By application filed on June 16, 1964, and amended on September 28, 1964, Emery Air Freight Corporation (Emery) seeks authority to file pick-up and delivery tariffs for extended terminal area service pursuant to Part 222 of the Boards Economic Regulations.[1] Emery seeks authority to file tariffs governing service from Boston to Nashua, New Hampshire, and to charge a rate of $2.00 per cwt. subject to a minimum of $4.00.[2]

Emery alleges that the purpose of its application is to extend through-bill services available at Boston to shippers

[1] By Order E-21891, dated March 10, 1965, the Board vacated Order E-21744, dated February 1, 1965, approving Emery's application in Docket 15325, in order to afford the National Motor Freight Traffic Association an opportunity to file comments on an amendment to Docket 15325.

[2] In adopting Part 222, the Board concluded that the full development of air-cargo transportation depends in large measure upon effective customer-oriented pick-up and delivery service under the control of either the direct air carrier, or the air freight forwarder, and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pick-up and delivery services to test their adequacy and economy.

and receivers in Nashua; that Nashua is located approximately 34 miles north of Boston on U. S. Route 3; and that Nashua has a strong cultural, commercial and industrial affinity to Boston. Emery contends that, since Nashua is beyond the 25-mile rule-of-thumb pick-up and delivery zone,[3] air freight shipments originating or terminating in Nashua must move by motor transportation to or from Boston, thereby denying shippers a through-bill service. Emery proposes to provide same day pick-up and delivery service from Boston and contends that this is the only method by which the full air cargo potential of Nashua can be realized.

Emery further alleges that the proposed service will be limited to the corporate limits of Nashua; that it will be performed with straight vans with a capacity of 5,000 pounds; that it will be an extension of Emery's present pick-up and delivery service to Lowell, Massachusetts, a point approximately 14 miles southeast of Nashua; and that the schedule of pick-up and delivery service will be coordinated with the airline schedules at Boston to provide "same night" air forwarding on those shipments picked up at Nashua during normal business hours and "same day" delivery on incoming shipments available to Emery at the Boston airport by mid-morning.

An answer in support of Emery's application has been filed by Eastern Air Lines, Inc.

The National Motor Freight Traffic Association (NMFTA) has filed a motion requesting that the Board dismiss Emery's application, or in the alternative, that it require the applicant to amend the application and thereafter set the application for oral hearing. NMFTA contends that the application should be dismissed because (1)

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[3] As defined by section 222.2 of the Board's Economic Regulations the 25-mile rule-of-thumb terminal area includes "places which are not located beyond a radius of 25 miles of the airport, or of the city limits of the certificated point".

the proposed point exceeds, in distance, a terminal zone recognized as exempt for purposes of motor carrier regulation by the Interstate Commerce Commission (ICC), (2) the economic data filed by the applicant are not in conformity with Part 222 and (3) the economic data filed by the applicant are insufficient to support a finding that the proposed services are "truly air cargo pick-up and delivery". NMFTA further contends that in the event the application is not dismissed by the Board, the application should be assigned for hearing because (1) the findings require the resolution of issues of fact and (2) all parties should have the right to present their case by oral or documentary evidence, and to submit rebuttal evidence in accordance with the provisions of the Administrative Procedure Act. Furthermore, NMFTA contends that the distance that must be traveled by the applicant in order to perform the proposed service is unreasonable and not in the nature of pick-up and delivery because it exceeds the 25-mile rule-of-thumb terminal area zone.

The Board has carefully reviewed the Emery application and the objections thereto, and upon consideration of all relevant facts, we conclude that Emery should be permitted to file tariffs for pick-up and delivery service between Nashua and Boston.

Part 222 is designed to provide a fair and workable procedure for considering, on a case-by-case basis, requests by direct air carriers or air freight forwarders for extension of pick-up and delivery services to points beyond the area covered by existing tariffs, or the established 25-mile rule-of-thumb terminal area. The ultimate question to be resolved in each individual case under such procedure is whether the service proposed by the air carrier is truly pick-up and delivery in nature; i.e., whether the service is in connection with air transportation within the meaning of section 403(a) of the Act. In addition to considering the distance involved, we shall also give weight to whether

the proposed service involves the use of specialized equipment, is geared to meeting airline schedules and is oriented to customer air transportation needs.[4]

Nashua is only 34 miles from Boston on the outskirts of the Greater Boston Metropolitan area, and has a strong community of interest with Boston. Furthermore, Boston is the nearest certificated point to Nashua offering multiple frequencies for the transportation of air cargo in all directions.[5] Thus, the ground transportation proposed is from a relatively small uncertificated city to a nearby metropolitan airport.

The distance between the points here involved is not so far as to preclude the services being offered as part of the basic air transportation service at Boston. In this respect the proposed service is no more extensive than services which we have authorized in the extended terminal areas encompassing New York, Chicago and Los Angeles. Furthermore, the applicant proposes to (1) coordinate pick-up and delivery services with the schedules of the direct air carriers serving the airport involved, (2) utilize equipment of the type traditionally used for pick-up and delivery operations, and (3) charge rates which are closely related to charges for pick-up and delivery service at points within the recognized terminal area zone. Based upon these considerations, we conclude that the service for which authority to file tariffs is granted, constitutes pick-up and delivery service and is "in connection with air transportation" within the meaning of section 403(a) of the Federal Aviation Act of 1958, as amended.

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[4] See Preamble to Part 222 of the Economic Regulations.

[5] Although the airport serving Manchester-Concord is closer to Nashua than Logan airport, Boston, the former provides far fewer frequencies; they are limited to serving points north or south of Manchester-Concord, and some backhaul would be required in the traffic movement to points south of Nashua.

We turn now to a specific consideration of the objections to grant of the application. Contrary to the contentions of NMFTA, applicant has complied with the requirements of Part 222 by filing data sufficient to show that the proposed service is designed to provide extended air freight pick-up and delivery to the point designated. Moreover, with respect to NMFTA's contention that the point here involved exceeds in distance the terminal zone recognized as exempt for purposes of motor carrier regulation by the ICC, no purpose would be served by speculating whether the ICC ultimately would make such a determination if a proper application were presented to it.[6] The only question here involved is whether the services proposed are in connection with air transportation under section 403(a) of the Act, and in our judgment they are.

We turn finally to NMFTA's contention that an evidentiary hearing should be held. The Act does not require that hearings be held in connection with the grant of permission to file pick-up and delivery tariffs. Moreover, we have considered whether to grant NMFTA's request in our discretion and find that no useful purpose would be served by holding an evidentiary hearing. The objecting party has taken full advantage of the opportunity to submit pleadings and briefs and we find no issues of material fact which would require resolution at an evidentiary hearing.[7]

ACCORDINGLY, IT IS ORDERED:

1. That Emery is hereby authorized to file tariffs providing for pick-up and delivery services to Nashua from Boston;

2. That the motion to dismiss and request for oral hearing filed by NMFTA be, and they hereby are denied; and

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[6] Our action, of course, is not intended to reflect any views on whether applicant or its motor carrier agent requires additional authority from the ICC or other regulatory agencies.

[7] The factual information filed by applicant has not been controverted by NMFTA.

3. That the authority granted herein shall be subject to amendment or revocation without evidentiary hearing.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

In The

Supreme Court of the United States

October Term, 1966

No. 939

Law Motor Freight, Inc. and National Motor Freight Traffic Association, Inc.,

Petitioners,

v.

Civil Aeronautics Board and Emery Air Freight Corporation,

Respondents.

No. 1160

National Motor Freight Traffic Association, Inc., and United Motor Freight, Inc.,

Petitioners,

v.

Civil Aeronautics Board and Emery Air Freight Corporation,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

George C. Neal
Brian G. Elmer
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Of Counsel:
Pogue & Neal

April 17, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. and NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
Respondents.

No. 1160

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., and UNITED MOTOR FREIGHT, INC.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the First Circuit are adequately described and set forth in the Appendix of the Petition in No. 989 at 13a-31a.

The judgment of the Court of Appeals for the District of Columbia Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the District of Columbia Circuit are adequately described and set forth in the Appendix of the Petition in No. 1160 at 13a-22a.

JURISDICTION

The jurisdictional requisites in each case are adequately set forth in the respective Petitions.

QUESTIONS PRESENTED

1. Whether the determinations of the Civil Aeronautics Board that particular motor vehicle services proposed to be included in an air carrier's tariff are "services in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act, and therefore to be treated as pickup and delivery services to and from certain airports for air cargo shipments, have a rational basis reasonably within the meaning of the statutory phrase quoted.

2. Whether, prior to making these determinations, the Civil Aeronautics Board was required to hold evidentiary hearings where: (a) the statute requires none; (b) Petitioners were given notice and an opportunity to present to the Board in written form any facts and argument in rebuttal to matters set forth in the applications and

relied on by the Board; (c) Petitioners tendered no issue of material fact; and (d) Petitioners' only interest was freedom from competition by the air carriers.

3. Whether the findings of the Civil Aeronautics Board are supported by substantial evidence.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act are Section 403(a), 49 U.S.C. § 1373(a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), and Section 204(a), 49 U.S.C. § 1324(a) (set forth at page 18 of the Appendix hereto). The pertinent provisions of the Interstate Commerce Act are Section 203(b)(7a), 49 U.S.C. § 303(b)(7a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), Section 202(c)(1), 49 U.S.C. § 302(c)(1), and Section 203(b)(8), 49 U.S.C. § 303(b)(8) (set forth at pages 18-19 of the Appendix hereto). The pertinent provision of the Administrative Procedure Act is contained in 5 U.S.C. § 553(c) (set forth at page 19 of the Appendix hereto). The pertinent provisions of the regulations of the Civil Aeronautics Board and the Interstate Commerce Commission are set forth in the Appendices of the Petitions in Nos. 989 and 1160.

STATEMENT OF THE CASE

A brief description of the historical background of the regulations involved is necessary to an understanding of the case.

Since aircraft can operate only to and from airports, air freight must move to some extent by surface means in order to flow between aircraft and airport, on the one hand, and consignee or consignor, on the other hand. That such a surface movement for the pickup and de-

livery of air freight is an essential part of the air movement and should be regulated as such, was recognized by Congress in its first comprehensive aviation regulatory statute, the Civil Aeronautics Act of 1938 (Act of June 23, 1938, ch. 601, 52 Stat. 977), predecessor statute to the present Federal Aviation Act of 1958. In the 1938 statute Congress amended section 203(b) of the Interstate Commerce Act by adding subsection (7a) (49 U.S.C. § 303(b)(7a)) so as to exempt from motor carrier economic regulation by the Interstate Commerce Commission

> "the transportation of . . . property by motor vehicle when incidental to transportation by aircraft . . ."

At the same time a provision was inserted in section 403 (a) of the Civil Aeronautics Act of 1938 which required direct and indirect air carriers to include in air transportation tariffs filed with the Board "all classifications, rules, regulations, practices and services in connection with such air transportation." That provision continues in effect in the same section of the present Federal Aviation Act (49 U.S.C. § 1373(a)). Other provisions of the present Act give the Board certain regulatory powers over matters contained in tariffs (e.g., sections 204a, 404, 1002(d), 49 U.S.C. §§ 1324(a), 1374, 1482(d)).

The Board and the Commission for many years have interpreted these statutory provisions as constituting bona fide motor vehicle pickup and delivery service for air freight a service "in connection with . . . air transportation" which is to be included in air carrier tariffs as a part of air transportation service and rates and which is exempt from economic regulation by the Commission under the Interstate Commerce Act. Until recently there were no general regulations prescribing precisely how the respective provisions of section 403(a) of the Federal Aviation Act and section 203(b)(7a)

of the Interstate Commerce Act would be administered and meshed.

In 1964, however, following joint consultations between the Board and the Commission, the two agencies issued complementary regulations as a means of clarifying what in general would be regarded as reasonable areas for air freight pickup and delivery service—and also providing procedures for their determination in particular instances.

The regulation adopted by the Board at that time was Part 222 of its Economic Regulations. The statutory basis for Part 222 is the provision of section 403(a) of the Federal Aviation Act that air transportation tariffs should include "services in connection with such air transportation."

Concurrently with the issuance of the Board's regulation, the Interstate Commerce Commission issued a regulation (49 C.F.R. § 210.40) in which it provided that areas for services "incidental to transportation by aircraft" within the meaning of the exemption from motor carrier economic regulation provided by section 203(b)(7a) of the Interstate Commerce Act would be the pickup and delivery areas established in air carrier tariffs pursuant to Part 222 of the Board's regulations.[1]

Part 222 of the Board's regulations provides that pickup and delivery services "to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point" may be included in air carrier tariffs without the necessity of Board consideration or approval. Board approval of service beyond such an area, however, must be sought, under section 222.3 of

[1] The Commission reserved the right on "its own motion or petition" to determine whether the exempt area should be different at a particular point than that set out in air carrier tariffs. As the Commission also noted, these exemptions apply only for the carriage of air freight in a continuous movement under a through airbill.

Part 222, by filing of an application for authority to file a tariff for such service. The Board is then to make a determination whether the service proposed is "in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act. The standards by which the Board makes this determination are set forth in a narrative preamble to Part 222 of the Board's Economic Regulation:

> "The Board will consider any such requests [for authority to file a tariff to provide air cargo pick-up and delivery service beyond the 25-mile zone] in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport." (Appendix of Petition in No. 1160 at 9a)

Emery Air Freight Corporation, an air freight forwarder, filed applications pursuant to Part 222 for authority to file air cargo pick-up and delivery tariffs for such service between the Boston, Massachusetts, airport and Nashua, New Hampshire, and for such service between the Detroit, Michigan, airport and Flint, Michigan. The airline distance between Boston and Nashua is 34 miles; the airline distance between Detroit and Flint is 45 miles.

Pursuant to the procedure provided in Part 222, Petitioner had an opportunity to file, and did file, with the Board objections to the grant of both applications. The Board denied Petitioners' motions to dismiss Emery's applications, denied, after receiving Petitioners' written submissions, Petitioners' requests for an evidentiary hearing on the applications, and granted both applications (Appendix of Petition in No. 989 at 26a-31a; Appendix

of Petition in No. 1160 at 17a-22a). Petitioners sought judicial review of the order relating to Nashua service in the United States Court of Appeals for the First Circuit and of the order relating to Flint service in the United States Court of Appeals for the District of Columbia Circuit. On review, both courts affirmed (Appendix of Petition in No. 989 at 13a-25a; Appendix of Petition in No. 1160 at 13a-17a).

ARGUMENT

I. Petitioner's Attack States Only Their Disagreement With Agency Policy, Not A Question Of Law.

These cases do indeed, as Petitioners have noted, present "new policy questions." But they are *policy* questions and, as such, have been entrusted by statute to the Civil Aeronautics Board and the Interstate Commerce Commission under broad general standards. Those standards—motor vehicle service "in connection with . . . air transportation" and motor vehicle service "when incidental to transportation by aircraft"—obviously must derive their content and meaning primarily from policy concepts as to how best to mesh the surface pickup and delivery and the air freight movement. The arguments which Petitioners would have the Court consider and act on are, at most, simply disagreements with the policy concepts the Board and Commission have now adopted in their regulations on the subject. Unless and until agency resolution of the policy questions results in a conflict in the agencies' assertions of jurisdiction there exists no legal question warranting this Court's review.

Petitioners seek this Court's interest and attention for its challenge by describing what they view as a conflict between the Board's assertion of its duty to promote air transportation and the role of the Interstate Commerce

Commission in regulating motor transportation.[2] Petitioners assert a conflict which does not exist.

Petitioners ignore the fact that the Board statement concerning the development of air cargo transportation, in which it defined Board policy in the matter of air cargo pick-up and delivery service, was issued only after *joint consultation* between the Board and the Commission and that that policy represents a *joint resolution* of the potential jurisdictional conflict. The Commission itself issued its own complementary regulation on the subject (49 C.F.R. § 210.40) in which it expressly recognized the Board's regulation and made specific provision for the consistent operation of its regulation with the Board's.

Nor does any conflict arise from the fact that the Commission itself defines *air* carrier pickup and delivery zones in a different and broader manner than it defines *surface* carrier pick-up and delivery zones. This difference is firmly grounded on basic differences in the modes of transportation and on differences in the statutory provisions being applied. See discussion at pages 12-14, *infra*. Earlier Commission decisions (see Appendix of Petition in No. 1160 at 16a) on the basis of which Peti-

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[2] The Board is under a congressional mandate to promote the development of air transportation. The Board stated its conclusion in the narrative preamble to Part 222 of its regulations that:

> "Full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation." (Appendix of Petition in No. 1160 at 8a)

tioners suggest the possibility of a conflict must be viewed in the light of the Commission's more recent decisions and joint action with the Board.

Neither the Board nor the Commission has been heard to complain of any agency conflict in this matter. While these agencies are in the middle of a constructive joint search for a policy which will accommodate the nation's air transportation needs without injuring the nation's transportation system as a whole, it would be wholly inappropriate to judicially define that policy, by way of statutory construction, where, as here, the applicable statutory standards were broadly stated in order to permit the administrative flexibility necessary to meet future avenues of development in a new mode of transportation.

It is not the Board's policy as embodied in the regulation and orders involved here that has major ramifications for the nation's transportation system as Petitioners suggest. The ramifications are implicit in the changes being brought about by technological advances in the air transport industry itself. The Board, and the Commission, must be permitted reasonable latitude to work out the intermodal transport problems created by those advances. Petitioners would have the capacity of the agencies to meet these dynamic developments reduced to a purely legalistic formula. There is nothing in the language of the statutes which warrants such a narrow approach. Common sense condemns it.

As to procedure, Petitioners ask this Court to declare that there is a right to an evidentiary hearing on these Board determinations of general and future application even though the statute under which the Board acted affords no such right. That the right to an evidentiary hearing does not exist in these circumstances has long been settled by judicial and legislative definition of hearing rights and does not warrant this Court's review.

II. The Decisions Of The Courts Below Are Correct.

A. *The Criteria Applied By The Board Are Valid.*

Section 403(a) of the Federal Aviation Act and Part 222 of the Board's Economic Regulations require that the Board's orders authorizing an air carrier to file tariffs providing for pickup and delivery service be based upon a finding that the proposed service is "in connection with . . . air transportation." The Board specifically made such a finding in both orders involved here (Appendix of Petition in No. 989 at 30a; Appendix of Petition in No. 1160 at 21a).

Petitioners' contention that the criteria by which the Board determined that the proposed services are "in connection with . . . air transportation" are not lawful raises the single question whether the criteria employed by the Board in making that finding have a rational relationship to the statutory phrase being applied. Whatever the form and content of petitioners' attack the question raised is the simple one: Do the Board's criteria rationally test whether a proposed service is "in connection with . . . air transportation"?

The Board's criteria, and their rational relationship to the concept of "service in connection with . . . air transportation," may be summarized as follows:

(1) In the Flint-Detroit order, the Board found that the proximity of the communities, the multiple airport complex there within a relatively limited geographical area, the nature of the dispersion of air schedules as between airports, and the inherent factors present which would continue to concentrate the area's air freight service at the Detroit airports, make Flint and Detroit a single economic unit for air freight service. This is a perfectly rational reason for concluding that the carriage

between the Detroit airports and Flint of Flint air freight to and from points beyond Detroit is service in connection with air transportation. Similarly, in the Nashua-Boston order the Board found that the dependence of Nashua upon Boston's Logan Airport for air freight service, the proximity of the communities and their close commercial and industrial affinity constituted Nashua and Boston a single economic unit for air freight service.

(2) The Board further assessed the service in light of the proposed use of specialized motor vehicle equipment (specialized in the sense that it is adapted to pickup and delivery operations). This, of course, is indicative of pickup and delivery operations and, almost by definition, tests the proposal against the statutory standard.

(3) Other criteria used by the Board were the coordination of the surface carriage with the direct air carrier schedules, the orientation of the service to purely customer air transportation needs, and the structure of rates in a manner closely relating them to pickup and delivery rates for existing pickup and delivery service within the existing 25 mile pickup and delivery zone. These basic characteristics of the service to be operated, taken together, certainly are reasonable indicators of a service "in connection with . . . air transportation."

Petitioners' argument that these criteria are invalid rests primarly on the premise that the appropriate standard by which to determine whether a service is "in connection with . . . air transportation" is that adopted by the Interstate Commerce Commission in defining areas for transfer, collection or delivery services for *surface*

freight moving on regular line-haul *surface* motor carrier or water carrier services (Petition in No. 1160 at 20). Petitioners' argument must be construed as a contention that the Interstate Commerce Act has defined and limited the definition of service in connection with air transportation required of the Board under the Federal Aviation Act and that the Board's criteria are irrevelant and irrational in terms of that definition. But in addition to the fact that there is nothing in the Federal Aviation Act which so limits the Board's judgment, the Interstate Commerce Commission itself has expressly held that different criteria should be applied in determining terminal areas for *air* carriers than those applied in the case of surface carriers.

The standard advanced by Petitioners is that articulated by the Commission for *surface* carriers in *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395 (1960), *aff'd sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D. Del. 1963):

> "Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery, and transfer service." (82 M.C.C. at 404)

This decision dealt with terminal areas for water carriers. Similar language is found in decisions dealing with terminal areas for line-haul motor freight.

Petitioners fail to point out that there are significant underlying differences in the language of the statute applied by the Commission in those cases and the language of the statute applied by the Board in the present cases. The Commission's concept of a *surface* carrier terminal

area as "a single homogenous community" was developed in the administration of sections 203(b)(8) and 202(c)(1) of the Interstate Commerce Act (49 U.S.C. § 303(b)(8), § 302(c)(1)) which expressly tied the scope of *surface* carrier terminal areas to the concept of a municipality or contiguous municipalties or adjacent commercially integrated areas. The statutory provisions of the Federal Aviation Act under which the Board issued its order in this case do not contain any language which defines the standard the Board must apply as does the language of section 203(b)(8) of the Interstate Commerce Act relating to surface carriers. The statutory language within which the Board's criteria are fashioned and against which they must be judged is simply "services in connection with . . . air transportation." The judgment required under the Interstate Commerce Act exemption for *air* transport pickup and delivery service is defined in equally general terms; section 203(b)(7a) simply refers to "transportation . . . when incidental to transportation by aircraft."

The Interstate Commerce Commission itself has specifically held that the criteria used for the establishment of terminal areas for surface carriers are *not* controlling in delineating the pickup and delivery areas for air transportation. In its decision promulgating the companion regulation to the Civil Aeronautics Board's regulation under which the Board issued its order in this case, the Commission reaffirmed the view that different considerations entered into defining pickup and delivery areas for surface carriers and for air carriers. Petitioners' assertion that the Commission adopted the surface carrier criteria in that decision and its regulation are contrary to the express conclusions of the Commission. In that decision, *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964), the Commission said:

> "In deciding not to fix a maximum mileage limitation for the 203(b)(7a) exemption, we are obviously

> disagreeing with the contentions of various parties, including petitioners, that shippers and receivers in areas adjacent to cities and communities have the same need for all modes of transportation—rail, express, water, motor vehicle, and air; and that, therefore, the terminal areas of carriers of all modes should be identical . . . . Each mode of transportation has its inherent advantages. Various economic and geographic factors sometimes prompt utilization of one mode of transportation over others. In *Kenny, supra,* we recognized that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify special consideration in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers." (95 M.C.C. at 86. Citations omitted.)

It is clear that the statutes involved do not require that the criteria applied by the Board or the Commission be other than those applied by the Board in this case.

B. *Petitioners Had No Right To An Evidentiary Hearing.*

The Board's order here involved was issued under section 222.3 of the Board's Economic Regulations. Part 222, and section 222.3 of it, were promulgated by the Board pursuant to sections 204(a) and 403(a) of the Federal Aviation Act as an application of the provisions of the latter section providing for the inclusion in air carrier air transportation tariffs of "services in connection with such air transportation." Neither section 403(a) nor section 204(a) of the Federal Aviation Act provide that the Board shall hold a hearing before issuing an order thereunder.

Moreover, the Board's determination in this case is clearly rule-making. Its determinations that pickup and delivery service is involved in air freight service to and from Nashua through Logan Airport and to and from

Flint through the Detroit airport are of future and general application and available to any air carrier whose operations between those points meet the appropriate criteria. Indeed, the Interstate Commerce Commission holds that its determination of individual commercial zone limits of surface carrier terminal areas under section 203 (b) (8) of the Interstate Commerce Act is rule-making. *St. Louis, Mo.-East St. Louis, Ill. Commercial Zone*, 61 M.C.C. 489 (1953). The provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c), require, in the rule-making process, only notice and opportunity to submit "written data, views, or arguments", not an evidentiary trial-type hearing. This alone was an appropriate basis on which to deny Petitioner's claim to a hearing. See *American Airlines, Inc.* v. *CAB*, 123 App. D.C. 310, 359 F.2d 624; *cert. denied*, 385 U.S. 843 (1966).

Petitioners' argument on this point is that the Board's order is a "licensing" of the applicant before the Board, to engage in motor transportation and that in agency "licensing" a hearing must be afforded.

Assuming, *arguendo*, that the Board's action was technically "licensing," neither due process nor any other rule of law requires a hearing for that reason. The several circuit courts of appeals in which the question of the scope of the hearing requirements of the Federal Aviation Act has heretofore been considered have uniformly ruled against such a broad hearing requirement as Petitioners argue for. Thus, in *Eastern Air Lines, Inc.* v. *CAB*, 87 App. D.C. 331, 185 F.2d 426 (1950), and in *American Airlines, Inc.* v. *CAB*, 97 App. D.C. 324, 231 F.2d 483 (1956), petitioning carriers were attacking the issuance by the Board of operating authority by exemption orders to carriers competing with the petitioning carriers. This was clearly licensing, yet it was held that the exemptions could be issued without evidentiary hearings. Like the carriers asserting the right to an agency

hearing in *Eastern Air Lines, Inc.* v. *CAB, supra,* and *American Airlines, Inc.* v. *CAB, supra,* what Petitioners claim at most is a right to be free from competition. Because the complaining carriers had no constitutional right to be free from competition, *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939), the due process clause gave them no right to be heard before a competing service was authorized.

If, as Petitioners argue, "due process" gave them some claim to a hearing, their right was not to any particular form of hearing. *Federal Communications Commission* v. *WJR*, 337 U.S. 265 (1949). Petitioners had ample opportunity to and did present pertinent facts to the Board bearing upon the question at issue. Their presentation by means of a written answer adequately spread on the record Petitioners' version of the facts relating to an issue of this kind.

Even if a constitutionally protected interest of Petitioners had been at stake in this proceeding, and even if these were not rule-making proceedings, Petitioners had no right to the presentation and cross-examination of witnesses, for the record reveals that there were no disputed material factual issues in these cases. The only issue raised by Petitioners' pleadings and affidavits before the Board was as to the proper legal conclusion to be drawn from admitted facts.

C. *The Board's Findings Are Supported By Substantial Evidence.*

Given the validity of the Board's criteria, there is no question that the findings made by the Board that these criteria were satisfied are supported by substantial evidence. Petitioners do not in fact really contest the existence of the facts found, but only their legal significance as criteria.

CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be denied.

Respectfully submitted,

GEORGE C. NEAL
BRIAN C. ELMER
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Of Counsel:

POGUE & NEAL

April 17, 1967

APPENDIX

Relevant Statutes

Federal Aviation Act of 1958, Section 204(a), 49 U.S.C. § 1324(a):

> (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

Interstate Commerce Act, Section 202(c)(1), 49 U.S.C. § 302(c)(1):

> Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder; . . .

Interstate Commerce Act, Section 203(b)(8), 49 U.S.C. § 303(b)(8):

> Nothing in this chapter, except the provisions of section 204 of this title relative to qualifications and

maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; . . .

Administrative Procedure Act, 5 U.S.C. § 553(c):

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

No. 1160

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND UNITED MOTOR FREIGHT, INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW[1]

The opinion of the Court of Appeals for the First Circuit in No. 989 (Pet. App. 13a–24a) is reported

[1] This brief is filed in opposition to two petitions for certiorari. Although separately filed, and challenging judgments of different courts, the issues are the same in both cases and in the first of the two to be filed (No. 989) petitioners "ask the Court to treat the statement of reasons why a writ should be granted" in the second case (No. 1160) "as the reasons why a writ should be granted in this case" (No. 989, Pet. 7–8).

at 364 F. 2d 139. The order of the Civil Aeronautics Board (Pet. App. 26a–31a) is not yet reported.

The Court of Appeals for the District of Columbia Circuit wrote no opinion in No. 1160, although a dissenting opinion (Pet. App. 14a–17a) was written. That court's judgment (Pet. App. 14a) is not yet reported. The order of the Civil Aeronautics Board (Pet. App. 17a–22a) is not yet reported.

JURISDICTION

The judgment of the court of appeals in No. 989 was entered on July 20, 1966, and a petition for rehearing was denied on August 23, 1966 (Pet. App. 25a). On November 23, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including January 20, 1967. The petition was filed on that date.

The judgment of the court of appeals in No. 1160 (Pet. App. 14a) was entered on December 6, 1966. By orders of Mr. Justice Brennan, dated March 6, 1967, and March 10, 1967, the time for filing a petition for certiorari was extended first to March 10, 1967, and then to March 27, 1967. The petition was filed on March 17, 1967.

The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, as a prerequisite to accepting air carrier tariffs setting forth motor vehicle pickup and delivery "services [to be provided] in connection with * * * air transportation" by the air carrier, within the meaning of Section 403(a) of the Federal Aviation Act, the Civil Aeronautics Board was re-

quired (a) to attempt to determine the status of the services under Section 203(b)(7a) of the Interstate Commerce Act, which exempts from ICC economic regulation motor transportation "incidental to transportation by aircraft", or (b) to await a Commission determination thereunder.

2. Whether, in determining to accept the tariffs, the Board's conclusion that the services described were "in connection with * * * air transportation" was based upon adequate and proper standards.

3. Whether the Civil Aeronautics Board in any event was required, prior to acceptance of the tariffs, to hold evidentiary hearings at the instance of motor carriers asserting competitive impact from the pickup and delivery services where (a) the statute requires none; (b) petitioners were given notice and an opportunity to present facts and argument in rebuttal to the matters set forth in the application for leave to file the tariffs; and (c) petitioners tendered no issues of material fact.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*, Part II of the Interstate Commerce Act, 49 Stat 543, 49 U.S.C. 301 *et seq.*, the regulations of the Civil Aeronautics Board and those of the Interstate Commerce Commission are set forth in the appendices (1a–12a) of both petitions for certiorari.

STATEMENT

These cases involve two orders issued by the Civil Aeronautics Board permitting Emery Air Freight

Corporation, a Board-licensed air freight forwarder,[3] to amend its air carrier tariffs so as to include pickup and delivery services to two points more than 25 miles from Boston and Detroit respectively. The tariff amendment contested in No. 989 provided for pickup and delivery service between Boston and Nashua, New Hampshire, located some nine miles beyond the perimeter of the 25-mile zone. The one involved in No. 1160 provided for such service between Detroit and Flint, Michigan, situated about 20 miles outside the 25-mile zone. Petitioners represent motor carrier interests in competition with Emery. In both cases, the Board found that the new points to be served were reasonably close to the principal cities and that, for purposes of air freight, each was, as a practical matter, a part of the area served by the airports of those larger cities. It also found that the proposed services would be rendered with equipment of the type traditionally used for pickup and delivery operations; that schedules would be closely coordinated with air schedules at the principal cities; and that rates were to be closely related to those charged for pickup and delivery services within the 25-mile zone. The Board

[3] Air freight forwarders are "indirect carriers" within the meaning of Section 101(3) of the Federal Aviation Act (49 U.S.C. 1301(3)) and hence require operating authority from the Board. They operate pursuant to a blanket exemption from the provisions of Section 401 of the Act (49 U.S.C. 1371), which requires air carriers to obtain certificates of public convenience and necessity as a condition precedent to lawful operation. See 14 C.F.R. 296. They are not, however, exempt from the tariff requirements of the Act. See generally *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7).

concluded that the services were pickup and delivery in character and properly includible in an air carrier tariff under Section 403(a) of the Federal Aviation Act (49 U.S.C. 1373(a)) as a "service in connection with * * * air transportation."

In order to perform a complete door-to-door service, air carriers engaged in the transportation of air freight have for many years held out to the public motor vehicle pickup and delivery services, performed either with their own trucks or under contracts with independent motor carriers who act as agents of the air carriers. Pursuant to Section 403(a) of the Act, which provides that, "to the extent required by regulations of the Board," air carrier tariffs shall show those "services in connection with * * * air transportation" which the carriers undertake to provide, the Civil Aeronautics Board requires air carriers to include in their tariffs whatever pickup and delivery services they offer. As a general rule, the Board has accepted tariffs without further inquiry if the pickup and delivery services were to be provided within a 25-mile radius of the point served by the air carrier.[3]

Motor carrier operations, of course, are generally subject to economic regulation by the Interstate Commerce Commission. However, Section 203(b)(7a) of the Interstate Commerce Act exempts from such regulation the "transportation of persons or property by motor vehicle when incidental to transportation by air-

[3] Tariffs to points well beyond the 25-mile zone were also filed and accepted, prior to the issuance of pertinent regulations in 1964 (see *infra*, pp. 6–7).

craft." When the Board accepts for filing an air carrier's pickup and delivery service tariff, this is neither a license to conduct motor transportation nor a determination under Section 203(b)(7a) that no license is required. The Commission alone determines whether the motor vehicle operation is subject to the certification requirements of the Interstate Commerce Act or is exempt under Section 203(b)(7a).

In recognition of the fact that the provisions of Sections 203(b)(7a) and 403(a) of the respective Acts are interrelated, though not identical in scope, and in order to minimize the possibility of interagency conflict, the Board and the Commission cooperated in the issuance of formal regulations in 1964. The Board's regulation, 14 C.F.R. Part 222 (No. 1160, Pet. App. 10a–11a), dealt with tariffs already on file with it and new ones which might be filed in the future.[4] With respect to existing tariffs, including those showing service to places more than 25 miles from the certificated point, it provided for their continued effectiveness. With respect to future tariffs, it provided automatic authority for the filing of tariffs covering service to places within 25 miles of either the airport or the city limits of the certificated point, and established a procedure under which permission may be granted, upon application, to file new tariffs showing such service to points beyond the 25-mile zone. It is the Board's grant of two applications for such permission which is challenged in these cases.

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[4] The opinion issued by the Board in promulgating its regulation is set forth in the Appendix to both petitions for certiorari, at pp. 6a–10a. The opinion promulgating the Com-

Under the Commission's regulation, 49 C.F.R. 210.40 (No. 1160, Pet. App. 3a–5a), motor transportation of property falls within the Section 203(b)(7a) exemption if (1) "it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier * * * providing the line-haul transportation, which terminal area * * * has been described in a tariff filed with and accepted by the Civil Aeronautics Board," and (2) "it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier * * * as part of a continuous movement which * * * shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier." Although the regulation thus continued the previous practice of treating as exempt those services described in air carrier pickup and delivery service tariffs on file with the Board, the Commission established a procedure under which, either on "its own motion or upon petition filed by any interested person," it could define for itself the boundaries of the terminal zone of a particular airport or city, "differing in extent from the terminal areas of * * * air carriers * * * as defined in tariffs filed with and accepted by the Civil Aeronautics Board" (No. 1160, Pet. App. 4a).

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mission's regulation is reported as *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71.

In permitting Emery to file the tariff amendments here involved, the Board rejected a contention by petitioners that the applications should be dismissed because they failed to show that the transportation would be exempt from Commission regulation under Section 203(b)(7a). The Board held that it was for the Commission to determine whether the operations required authorization by it. Also rejected were petitioners' alternative request that evidentiary hearings be held as to each of these matters. The Board pointed out that hearings are not required by the pertinent statutory provisions, and that no issues of material fact had been developed, notwithstanding the fact that all parties had had full opportunity to submit whatever data they wished.

The first of the Board's orders, the one involving Nashua (No. 989), was affirmed by the Court of Appeals for the First Circuit. The court rejected petitioners' contention of procedural irregularity, holding that a hearing was not statutorily required, and that none was required as a matter of constitutional necessity, since petitioners' only interest stemmed from the increased competition which Emery would provide. On the merits, it found reasonable the factors upon which the Board relied in determining that the operation would be a pickup and delivery service in connection with air transportation within the meaning of the Federal Aviation Act. It pointed out that the regulations of the Board and the Commission reflect "a continuing accommodation between two independent agencies," while at the same time preserving

the independent authority of each to interpret and apply the provisions of the statute it administers. The court observed that petitioners had not sought a determination of the status of the service under the Interstate Commerce Act, and that "there is not even a conflict between administrative actions" (No. 989, Pet. App. 24a).

The second order, involving Flint, was affirmed by the Court of Appeals for the District of Columbia Circuit, in a *per curiam* decision, with one judge dissenting, on the basis of the First Circuit's earlier holding (No. 1160, Pet. App. 14a).

ARGUMENT

These cases were correctly decided by the courts below, present no conflict of judicial or administrative decisions, and do not warrant review by this Court.

1. The Civil Aeronautics Board's determinations, upheld by both courts of appeals for the same reasons, involve no more than administrative approval of the contents of an air carrier's tariff. As the First Circuit observed, because of interagency cooperation and comity, there is no conflict between the Board and the Interstate Commerce Commission. Under its regulation and in the orders under review, the Board leaves to the Commission the question of the status of pickup and delivery services under the Interstate Commerce Act and recognizes that a certificate from the Commission would be necessary for the performance of the services if the Commission should determine that they are not exempt under Section 203(b)(7a). Moreover, the Commission's

regulation establishes a special procedure for determination by it, either upon petition or the Commission's own initiative, of this precise queston. Petitioners have not sought such a determination with respect to the pickup and delivery services here involved; nor has the Commission undertaken such an inquiry on its own initiative, notwithstanding that it is fully aware of the Board's actions.[5]

2. Petitioners' basic contention is that the Board's acceptance of a pickup and delivery service tariff under Section 403(a) is a "license" to engage in motor transportation, and hence that such a tariff can be accepted only if the service described therein is exempted by Section 203(b)(7a) from certification under the Interstate Commerce Act. However, in recognition of the fact that it is for the Commission to determine whether any motor vehicle operation requires its certification,[6] neither the Board's regulation nor the orders here involved purport to license motor transportation or to determine its status under the

[5] See the letter, set forth as an Appendix to this brief, from the General Counsel of the Interstate Commerce Commission to the Department of Justice with respect to this litigation. In this connection, we note petitioners' suggestion that this letter indicates the existence of inevitable interagency conflict (No. 1160, Pet. 20). Read in its entirety, however, the letter indicates precisely the opposite. We are authorized to state that the Interstate Commerce Commission concurs in the views expressed in the instant brief in opposition.

[6] See *Air Dispatch* v. *United States*, 237 F. Supp. 450 (E.D. Pa.), affirmed *per curiam*, 381 U.S. 412; *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (C.A.D.C.); *Wycoff Co.* v. *United States*, 240 F. Supp. 304 (D. Utah).

Interstate Commerce Act.[7] The Board simply decided that the motor transportation service described in the tariffs in question meets the standards of the Federal Aviation Act for an air carrier's tariff. It constitutes a service which the air carrier undertakes to provide; this service may or may not require operating authority from the Commission. Petitioner's remedy for testing this question lies in the Commission.

The courts below properly held that each agency has independent authority to interpret and apply its own statute (see the cases cited in note 6, *supra*). Actual experience has shown, moreover, that this does not create interagency conflict precisely because the Board recognizes the independence of the Commission with respect to the applicability of the Interstate Commerce Act.[8]

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[7] As the Board said in its notice of proposed rulemaking (26 Fed. Reg. 8037), "[N]or does the Board specifically license or directly control the provision of such service. The exercise of Board authority has heretofore been confined to accepting or rejecting tariffs filed under Section 403(a) of the Act as providing service 'in connection with * * * air transportation.' Whether or not the surface transportation under the terms of a tariff may be lawfully performed depends primarily upon whether it is a service which is 'incidental to transportation by aircraft' under the Interstate Commerce Act and thus exempted pursuant to that statute." See also the Board's opinion promulgating the pickup and delivery service tariff regulation (No. 1160. Pet. App. 7a).

[8] If the Commission were to determine that the motor transportation described in an air carrier tariff on file with the Board required a license from the Commission and were to deny such a license, the carrier would, of course, be unable to provide the service and thus would have to cancel the tariff. This would not conflict with the Board's determination, however, which amounts to no more than that the service, *if provided*, is the

3. There is no merit to petitioners' challenge to the standards applied by the Board in implementing Section 403(a) and its own regulation thereunder. As the courts below held (No. 989, Pet. App. 24a), the Board's "formula [was] a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments." The Board relied upon the fact that, from a practical and operational point of view, the service was of a sort characteristic of air freight pickup and delivery service, and that it would be provided to points which were reasonably close to Boston and Detroit[9] and which were a part of the area served by the airports of those principal cities for air freight purposes.[10] Under these standards, the Board's decisions are

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sort of service which must be described in the air carrier's tariff.

[9] We note the footnote contention of petitioners in No. 1160 (Pet. 6) that Flint is 65 to 80 miles from the Detroit airports, depending on the route used. This overlooks the fact that, in computing distances for pickup and delivery service purposes under the Board's regulation, either the airports or the city limits of the point in question are used (No. 1160, Pet. App. 10a). We also note in this connection that Metropolitan Airport, the closer of the two Detroit airports, is approximately 17 miles southwest of the city. If it were located a similar distance to the northwest of the city, Flint would be barely three miles beyond the 25-mile zone.

[10] The contention that the Board's findings lack adequate factual support plainly does not call for this Court's consideration. It relates, moreover, largely to the alleged lack of showing of a "nexus" between Detroit and Flint. The carrier's application, however, set forth facts which, in sum, showed that, for air freight purposes, Flint was essentially a satellite of Detroit.

plainly supported by substantial evidence. As the First Circuit observed, this approach is "not unreasonable for an agency mandated to develop air transportation."[11] It is therefore entitled to respect by the courts. *Udall* v. *Tallman*, 380 U.S. 1, 4. That respect was properly accorded by the courts below.

4. As to petitioners' contention that the Board was required to hold evidentiary hearings, it is immaterial whether its actions are viewed as rulemaking or adjudication. Assuming them to have been the latter, no hearings were required. In contrast to numerous other provisions, Section 403(a) contains no requirement for a hearing prior to Board action thereunder. The courts below properly concluded that the express requirement of a hearing in numerous sections of the Act and the absence of such a requirement in others indicate that the "legislative omission was significant," and that a hearing is not necessary unless specifically directed.[12] Moreover, as the courts below properly found, petitioners raised no issues of material fact in their oppositions to the applications. See *Railway Express Agency* v. *Civil Aeronautics*

[11] The Board is under an affirmative statutory directive (49 U.S.C. 1302) to promote and develop air transportation, including air freight. See *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.). It was pursuant to this directive that the Board promulgated its pickup and delivery service tariff regulation (see Pet. App. 8a).

[12] *American Trucking Associations* v. *United States*, 344 U.S. 298, 319, 320; *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286, 292 (C.A. 8); *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426, 427 (C.A.D.C.), vacated as moot, 341 U.S. 901.

Board, 345 F. 2d 445 (C.A.D.C.), certiorari denied, 382 U.S. 879; *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* No. 20,350, C.A.D.C., decided February 28, 1967.[13]

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General,
DONALD F. TURNER,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Attorney.

JOSEPH B. GOLDMAN,
General Counsel,
O. D. OZMENT,
Deputy General Counsel,
WARREN L. SHARFMAN,
Associate General Counsel,
ROBERT L. TOOMEY,
Attorney,
Civil Aeronautics Board.

APRIL 1967.

[13] We note that the affidavit filed in opposition to the application involved in No. 1160 raised no more than a question as to whether the proposed service could be "economically or efficiently" performed.

APPENDIX

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C. 20423, LSG:ch, *March 28, 1966.*

Re: *National Motor Freight Traffic Association, Inc., et al.* v. *Civil Aeronautics Board,* C.A.D.C. No. 19953.

HOWARD E. SHAPIRO, Esq.,
Assistant Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C. 20530.

DEAR MR. SHAPIRO: In your letter of March 21, 1966, you requested our comments on the petition for review of the Board's order of December 6, 1965, in the above case. By this order the Board permitted Emery Air Freight Corporation, an air freight forwarder, to file tariffs governing motor carrier service from Detroit airports to Flint, Michigan, a distance of 45 miles.

The petitioner in the Court of Appeals is the tariff-filing agent of most of the major motor common carriers of property in the United States. It argues; 1) the Board is without authority to accept Emery's tariff for filing, for such tariff permits a motor carrier operation beyond a reasonable terminal area of the Detroit airports without any operating authority from the Interstate Commerce Commission; and 2) the Board's finding that Emery's operation is a bona fide pickup and delivery service is not supported by substantial evidence. I believe that the Board's decision presents no conflict with the jurisdiction of this Commission.

The effect of the Board's decision is to permit Emery to file a tariff under the applicable standards of Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373(a). The Board has found that in its view Emery will provide a bona fide pickup and delivery "service in connection with * * * air transportation," in the language of Section 403(a). It expressly refused "to reflect any views on whether applicant [Emery] or its motor carrier agent requires additional authority from the I.C.C. or other regulatory agencies." Order of December 6, 1965, p. 4, note 5.

The Board's present order is similar to the decision sustained in *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir. 1961), where the Board decided that an airline could use a motor carrier to perform "air transportation" under an air carrier certificate without deciding whether the airline or its motor carrier agent needed additional authority from the Interstate Commerce Commission to perform the motor carrier service. The Board was sustained in the Court of Appeals essentially on the grounds, which also apply to the present case, that the Board is not precluded from deciding whether a motor carrier operation complies with the requirements of the Aviation Act although the operation may not be in compliance with the requirements of the Interstate Commerce Act. Whether a particular motor carrier operation is exempt from the latter act under Section 203(b)(7a), 49 U.S.C. § 303(b)(7a), is in either event for this Commission to decide.

Moreover, in the present case the petitioner has other specific administrative remedies available to it, if it believes Emery is operating beyond the exemptions of Section 203(b)(7a). The Board acted pursuant to 14 CFR Part 222 in accepting Emery's

tariff for filing. These rules were adopted concurrently with ICC regulations (49 CFR 210.40(c)) which provide for individual determination of exempt zones under Section 203(b)(7a), *after* the CAB has acted. Petitioner, therefore, may file a petition with the Commission requesting it to determine appropriate boundaries for the exempt zone(s) around the Detroit airports which may differ in extent from the terminal area defined in tariffs accepted by the CAB. If the ICC should decide that for purposes of Section 203(b)(7a) the terminal area around the Detroit airports cannot be as large as the terminal area satisfying Section 403(a) of the Aviation Act, presumably Emery will have to obtain appropriate ICC operating authority to perform that part of its motor service which is not exempt from the Interstate Commerce Act.

The petitioner may argue in the pending litigation that the Board's action, without the concurrence of the ICC, creates a potential conflict in their respective jurisdictions, for basic to both Section 403 and 203(b)(7a) is a determination of whether Emery is performing a bona fide pickup and delivery service. If it is performing such a service, then its motor carrier operation will be both, "in connection with" air transportation (under Section 403(a) of the Aviation Act) and "incidental" to transportation by aircraft (under Section 203(b)(7a) of the Interstate Commerce Act).

The draftsmen of the CAB and ICC regulations in this area foresaw the potential "conflict". The Board, for example, stated the following in adopting Part 222 (29 F.R. 6276):

> Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether

the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings and that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

We may assume, therefore, that although the Board has found Emery is providing a bona fide pickup and delivery service, the Commission may not so find. The Commission will, of course, give weight to the Board's decision, but will not be bound by that decision. Both the Board and ICC decisions must be supported by substantial evidence, and it is not unusual that substantial evidence may support more than one result on the same record. See *Consolo* v. *Federal Maritime Commission,* No. 63, U.S.S. Ct. p. 12 of slip opinion, decided March 22, 1966, and cases cited. I, of course, cannot now say whether the Commission would give the same weight to each of the factors that convinced the Board that Emery is providing a bona fide pickup and delivery service between Detroit and Flint; nor do I comment on whether the Board's finding is supported by substantial evidence.

I hope you will find the foregoing comments helpful.

Yours very truly,

(S) Robert W. Ginnane,
ROBERT W. GINNANE,
General Counsel.

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